STATE OF MICHIGAN

COURT OF APPEALS

ACEMCO, INC.,

Plaintiff/Counter-Defendant-Appellee,

v

RYERSON TULL COIL PROCESSING,

Defendant/Counter-Plaintiff-Appellant.

UNPUBLISHED
January 15, 2008

No. 272491
Muskegon Circuit Court
LC No. 04-043203-CK

Before: Bandstra, P.J., and Meter and Beckering, JJ.

PER CURIAM.

In this contract dispute, defendant appeals by leave granted the July 31, 2006, trial court order denying its renewed motion for summary disposition. Defendant argues that it is entitled to summary disposition because the parties' agreement lacks a quantity term sufficient to satisfy the statute of frauds. We reverse and remand for entry of an order granting summary disposition to defendant.

Defendant sells processed steel and plaintiff produces automotive parts from steel. In the spring of 2003, the parties negotiated a deal under which defendant agreed to sell steel to plaintiff. The parties subsequently executed a written agreement ("Supply Agreement") formalizing the terms of the deal. In relevant part, the parties agreed to the following obligation:

> 1. Purchase of Products. During the term of this Agreement, the Seller agrees to sell to the Buyer and the Buyer agrees to buy from the Seller such quantities of the Products as the Buyer may specify in its purchase orders, the estimated volume of which will be a total of 33,950,000 pounds for all of the Products, plus or minus 20%, over the term of the Agreement.

In the fall of 2003, defendant delivered steel to plaintiff pursuant to the terms of the Supply Agreement. In January 2004, plaintiff ordered 40,740,000 [33,950,000 plus 20 percent] pounds of steel from defendant. When defendant did not supply the requested steel, plaintiff refused to pay for the steel previously delivered by defendant. Plaintiff subsequently sued defendant for breach of contract. Defendant then filed a countercomplaint for breach of contract and account stated or, in the alternative, for unjust enrichment and *quantum valebant*.

In October 2004, defendant moved, unsuccessfully, for summary disposition, under MCL 2.116(C)(8), alleging that the Supply Agreement lacked mutuality and an enforceable quantity term. One year later, defendant filed a renewed motion for summary disposition on the same basis in light of this Court's decision in *Acemco, Inc v Olympic Steel Lafayette, Inc*, unpublished opinion per curiam of the Court of Appeals, issued October 27, 2005 (Docket No. 256638). The trial court denied defendant's renewed motion for summary disposition, finding that the language in the Supply Agreement estimating the volume of products plaintiff might purchase under the contract constituted a quantity term sufficient to satisfy the statute of frauds. This appeal followed.

We review a trial court's decision on a motion for summary disposition under MCR 2.116(C)(8) de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). In a contract-based action, the contract attached to the complaint becomes part of the pleadings. *Liggett Restaurant Group, Inc v Pontiac*, 260 Mich App 127, 133; 676 NW2d 633 (2003). All well-pleaded factual allegations are accepted as true and construed in the light most favorable to the nonmoving party. *Maiden*, *supra* at 119. The motion "may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id*. (internal quotations omitted). The interpretation of a contract presents questions of law that we review de novo. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002).

Because the contract between the parties is one for the sale of goods, the Michigan Uniform Commercial Code (UCC), MCL 440.1101 *et seq*., governs the issues in this case. The UCC statute of frauds provision provides that a contract for the sale of goods must be in writing to be enforceable, and further, that "the contract is not enforceable . . . beyond the quantity of goods shown in the writing." MCL 440.2201(1). Our Supreme Court has held that this provision requires that the quantity term in a contract for the sale of goods be specifically stated. *Lorenz Supply Co v American Standard, Inc*, 419 Mich 610, 614-615; 358 NW2d 845 (1984).

We agree with defendant that the contract at issue in this case is unenforceable because it lacks a specifically stated quantity term as is required by MCL 440.2201(1). In construing a contract, a court must consider the contract in its entirety and all of the words included in the contract should be given their plain and ordinary meaning. *Perry v Sied*, 461 Mich 680, 697; 611 NW2d 516 (2000). The Supply Agreement states that plaintiff will buy "such quantities of [steel] as [plaintiff] *may* specify in its purchase orders," (emphasis added). "May" is a permissive term indicative of discretion. *In re Forfeiture of Bail Bond*, 276 Mich App 482, 492; 740 NW2d 734 (2007). By its use of the term "may," the Supply Agreement plainly affords plaintiff the discretion whether to purchase any steel whatsoever from defendant. It does not obligate plaintiff to buy any specifically stated or ascertainable quantity of goods.

Plaintiff argues that the language estimating the volume of steel products that it may purchase under the Supply Agreement as "a total of 33,950,000 pounds for all of the Products, plus or minus 20%" constitutes a "fixed quantity range" and that it was obligated to purchase an amount of steel within that fixed range. We disagree. This language merely speculates about the quantity of steel that plaintiff *might* choose, in its discretion, to buy. Despite this language, plaintiff maintained complete discretion under the Supply Agreement to purchase *any* quantity of

steel from defendant, even if that quantity was zero. As a panel of this Court previously explained:

> Reasonable minds could not construe the [language of the agreement] as containing a quantity term because the language specifies no quantity whatsoever. The language instead grants complete discretion to the buyer to deliver purchase orders containing any amount or no amount at its discretion without any other limiting feature. The grant of complete discretion results in a countless number of possible quantities from zero to infinity. "Any" quantity is in fact no quantity at all. *Olympic Steel, supra* at 5.

Plaintiff relies on this Court's holdings in *In re Frost Estate*, 130 Mich App 556; 344 NW2d 331 (1983) and *Great Northern Packaging, Inc v General Tire & Rubber Co*, 154 Mich App 777; 399 NW2d 408 (1986) to argue that the estimate language sufficiently specifies a fixed quantity to satisfy the requirements of MCL 440.2201(1). We disagree. In *Frost Estate, supra* at 558-561, this Court held that a writing stating that the seller "[s]old all trees" and that the buyer was to "[t]ake all sawable wood" from a particular parcel of property evidenced an obligation to sell and purchase which, while imprecise, was sufficiently specific to satisfy the requirements of MCL 440.2201(1). Unlike the language at issue here, the terms "all trees" and "all sawable wood," convey stipulated, fixed and specifically identifiable quantities. Thus, that the writing did not state a specific numerical quantity was not fatal to the agreement. Similarly, in *Great Northern Packaging*, this Court considered the term "blanket order" appearing on an actual purchase order. That purchase order was a change order altering an earlier purchase order for fifty units, and it evidenced an obligation to sell and purchase which, again, while imprecise, was sufficiently specific to satisfy the requirements of MCL 440.2201(1). *Great Northern Packaging, supra* at 780, 787. In both *Frost Estate* and *Great Northern Packaging*, the language at issue clearly obligated the buyer to purchase *some* quantity of goods from the seller. But, in the case at hand, the contract between the parties does not contain any language obligating plaintiff to purchase anything at all from defendant. Rather, the contract affords plaintiff complete discretion whether to purchase any products under the agreement. Therefore, the contract does not contain a quantity term satisfying the statute of frauds.

Plaintiff further argues that, even if the Supply Agreement does not contain an enforceable quantity term, an email sent by one of defendant's employees contains a quantity term sufficient to satisfy the statute of frauds. We disagree. Parol evidence should not be considered in cases where the quantity term is completely lacking. See *Frost Estate, supra* at 561 (holding that parol evidence is admissible to establish an exact quantity only when a quantity term is present, but imprecisely stated). Further, while the email states that the "entire direct package . . . is annualized at 22,500 tons," there is no evidence on the record that this amount does not, again, merely represent an estimated annual volume. Moreover, the quantity stated in the email differs from the estimate included in the Supply Agreement and the email was sent before the parties signed, or even reviewed, the final Supply Agreement.

Plaintiff next argues that defendant's admissions in its pleadings and deposition testimony independently satisfy the statute of frauds. We disagree. Our legislature has provided a judicial admission exception to the writing requirement of the statute of frauds in MCL 440.2201(3)(b). MCL 440.2201 provides in pertinent part:

> (1) Except as otherwise provided in this section, a contract for the sale of goods for the price of $1,000.00 or more is not enforceable . . . unless there is a writing sufficient to indicate that a contract for sale has been made between the parties . . . .
>
> * * *
>
> (3) A contract that does not satisfy the requirements of subsection (1) but is valid in other respects is enforceable in any of the following circumstances:
>
> * * *
>
> (b) If the party against whom enforcement is sought admits in his or her pleading or testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this section beyond the quantity of goods admitted.

In its countercomplaint, defendant stated that "the parties had a valid and enforceable contract," in support of its breach of contract claim. While defendant's admission fulfills the first prong of MCL 440.2201(3)(b), that a contract for sale was made by the parties, it does not fulfill the second prong of MCL 440.2201(3)(b) regarding enforceability. Even if a contract is admitted, "the contract is not enforceable under this provision beyond the quantity of goods admitted." Review of defendant's pleadings does not reveal any "quantity of goods admitted" or even a reference to quantity under the Supply Agreement. Therefore, we find that while defendant's countercomplaint constitutes an admission that the parties made a contract for the sale of goods, it does not make the Supply Agreement enforceable under the judicial admission exception because there is no admitted quantity fulfilling the second prong of MCL 440.2201(3)(b).

Next, plaintiff claims that the deposition testimony of several of defendant's employees satisfies MCL 440.2201(3)(b). Upon review of this deposition testimony, it is apparent that defendant's employees admitted the existence of a contract for the sale of goods. However, again, defendant's employees did not admit a quantity of goods fulfilling the second prong of MCL 440.2201(3)(b). Therefore, we find that their testimony does not make the Supply Agreement enforceable pursuant to the exception found in MCL 440.2201(3)(b).

Because there is no quantity term included in the Supply Agreement, and because plaintiff can point to no pleading or evidence by which defendant admitted such a quantity term, we find that the trial court erred in denying defendant's renewed motion for summary disposition.

We reverse and remand for entry of an order granting summary disposition to defendant. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Patrick M. Meter
/s/ Jane M. Beckering